(2)

No. 90-910

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

KIRK L. WHITCOMBE,

Petitioner,

v.

WEYERHAEUSER CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the doctrines of sovereign immunity and judicial immunity to dismiss petitioner's 42 U.S.C. § 1983 claims?

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COUNTERSTATEMENT OF THE CASE

Facts of the case are fully set forth and fairly presented in the opinion of the court below. (Pet., App., pp. 1A - 5A.)

ARGUMENT

A. INTRODUCTION

What is presented in this case is an attempt by petitioner to avoid application of the long-standing doctrines of sovereign immunity and judicial immunity to the 42 U.S.C. § 1983 claims presented. Petitioner remarkably asserts that states, judges, courts, and judicial officers are not entitled to judicial immunity for § 1983 claims for damages under *Pulliam v. Allen*, 466 U.S. 522 (1984); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); and *Hutto v.*

Finney, 437 U.S. 678 (1978), irrespective of the nature of the alleged unconstitutional acts or prayers for relief. These cases are not in conflict with the ruling of the court below. The court below has properly and fairly denied petitioner's claims.

B. THE RULING OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF ANY OTHER FEDERAL COURT.

1. *Pulliam v. Allen, 466 U.S. 522 (1984), and Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), Are Not in Conflict With the Ruling of the Court Below.*

The Court of Appeals for the Ninth Circuit was correct in dismissing petitioner's claims against judges, courts, and judicial officers under the doctrine of judicial immunity.

In order to prevail, petitioner must convince this Court to disregard the nature of the acts of the judges and judicial officers, the prayer for relief, and a body of case law which is unequivocally in favor of judicial immunity.

The Supreme Court has long recognized that judicial immunity bars § 1983 actions against courts and judges for discretionary judicial acts. *Bradley v. Fisher*, 80 U.S. 335 (1872); *Dennis v. Sparks*, 449 U.S. 24 (1980); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978). The same reasoning has been applied to judicial officers including court clerks. *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812 (10th Cir. 1981); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1987). Liability will not be imposed even if an action was in error. *Pierson v. Ray*, 386 U.S. 547 (1967).

Petitioner has made a claim for damages against respondent judges and judicial officers for acts which are unquestionably discretionary judicial acts. No prospective relief enjoining judicial acts has been sought or awarded. Consequently, the limited holdings of the cases cited by petitioner as conflicting with the decision of the court below are not controlling.

Pulliam v. Allen's narrow holding is inapplicable to this case. The claims are dissimilar, as are the prayers for relief. In *Pulliam*, the Supreme Court's actual holding was

> We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.

Pulliam, 466 U.S. at 541.

Since 1868, the Supreme Court has, as the dissent in *Pulliam* stated, consistently held

> that judges are absolutely immune from civil suits for damages. *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 55 L. Ed.2d 331, 98 S.Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 18 L. Ed.2d 288, 87 S.Ct. 1213 (1967); *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed 646 (1872); *Randall v. Brigham*, 7 Wall 523, 19 L. Ed. 285 (1869).

Pulliam, 466 U.S. at 545.

Again in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980), the Supreme Court stated

> Adhering to the doctrine of *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed. 646 (1872), we have held that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities.

The narrow holding in *Virginia* does not support petitioner's claims. The Virginia Supreme Court had enforcement powers for a code of conduct for the state bar association. This Court held that judicial immunity does not shield the Virginia Court and its Chief Justice from § 1983 actions when acting in their enforcement capacities. *Id.* at 736.

It was the nature of the enforcement powers being exercised, not discretionary judicial acts, which resulted in a holding that the *Virginia* Court was not immune. The respondents exercised no similar powers in petitioner's case. Clearly, the holding in *Virginia* is not in conflict with the decision of the court below.

2. *The Decision of The Court Below Is Not In Conflict With The Holding in Hutto v. Finney, 437 U.S. 678 (1978).*

The Supreme Court in *Hutto* held that a state was not immune under the eleventh amendment for violating a remedial federal court order. Petitioner extrapolates the holding in *Hutto* to assert that states are not immune from all § 1983 actions. The holding in *Hutto* is a narrow exception to the doctrine of sovereign immunity solely for the purpose of federal enforcement actions under the fourteenth amendment. *Id.* at 693. Petitioner presents no such case to this Court.

It has been clearly and consistently held by the Supreme Court that states and their agencies are absolutely immune from § 1983 actions under the eleventh amendment to the United States Constitution. *Quern v. Jordan*, 440 U.S. 332, 344 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Papasan v. Allain*, 478 U.S. 265 (1986).

Even though states may waive immunity and consent to be sued in federal court, Washington State has not waived its sovereign immunity under the eleventh amendment. *McConnell v. Critchlow*, 661 F.2d 116, 117, (9th Cir. 1981).

CONCLUSION

The ruling by the court below that petitioner is barred from asserting his § 1983 claims against the state of Washington and the judges and judicial officers of Washington under the doctrines of sovereign immunity and judicial immunity was proper. The petitioner does not present an important question of federal law unsettled by this Court, or one in conflict with applicable decisions of this Court, or a case otherwise calling for the supervision of the Supreme Court of the United States. The long-standing doctrines of sovereign and judicial immunity should not be disturbed by accepting this insignificant case. The petition should be denied.

DATED: March 14, 1991.

Respectfully submitted,

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